

1 carriage and the terms of carriage that you
2 would want.

3 MR. FELD: Yes, Your Honor, there
4 is a letter transmitting a carriage offer from
5 iN DEMAND to the Complainants in that case.

6 JUDGE SIPPEL: iN DEMAND, do they
7 constitute the Defendants in this case in
8 another context?

9 MR. FELD: That will be a matter I
10 think we will explore. iN DEMAND --

11 JUDGE SIPPEL: Or what the
12 relevance is that -- if it's not, I mean if iN
13 DEMAND --

14 MR. FELD: iN DEMAND is the
15 programming producer both here and in that
16 case. The reason why these Defendants are the
17 Defendants is because through their
18 affiliation and control of iN DEMAND and the
19 iN DEMAND partnership, they are the carriers
20 affiliated with this programming for the
21 purposes of the complaint here.

22 In the matter of the program

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1 access complaint, there was the same issue.
2 There was a requirement of affiliation in
3 order to trigger the program access complaint
4 that arose in precisely the same factual
5 situation. IN DEMAND was as much or as little
6 of the party in question here as there.

7 The evidence of what constituted
8 the terms that were considered to be fair
9 terms for carriage of what we say is the
10 similarly-situated programming would seem to
11 be relevant.

12 Furthermore, they formed a basis
13 for the testimony and the request for a
14 remedy. We present this as what is the
15 evidence of our foundation when they wish to
16 ask us well, why do you think that's a fair
17 remedy? We would like to be able to respond
18 well, because in these publicly-available
19 documents, we had IN DEMAND, the producer of
20 the programming, the similarly-situated
21 programming say well, this is what we think is
22 a reasonable offer. We think that it's,

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1 again, a matter that Your Honor can decide,
2 whether that has substantial weight or not.
3 We present it here because we're required to
4 present it here.

5 We can come back during the course
6 of the hearing and present what pieces may
7 seem necessary which seems to be what Mr.
8 Cohen is suggesting, rather than have a ruling
9 now on whether to include it or not or not to
10 include it and designated it for
11 administrative convenience as an exhibit to
12 move in now and discuss these broader
13 objections, but we are prepared to introduce
14 it at later phases as may seem relevant, if
15 that would be of assistance.

16 JUDGE SIPPEL: Well, what you're
17 suggesting, the latter part of your statement
18 leaves me a little bit nervous. But let me
19 ask you this. If you got the basis -- could
20 this be something that could be stipulated,
21 that if you succeeded on the merits of part
22 one, you know, the discrimination issue, then

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1 this is what you would be seeking in terms of
2 -- basically, it's the carriage terms and the
3 rate that basically that's it, isn't it? It's
4 money in terms of carriage.

5 MR. COHEN: Your Honor, there are
6 two problems. This -- first of all --

7 JUDGE SIPPEL: Well, let me first
8 ask --

9 MR. COHEN: I'm sorry, Your Honor.

10 MR. FELD: It would certainly suit
11 us to stipulate what our proposed remedy would
12 be on the assumption that we are successful in
13 our phase one showing of liability and simply
14 stipulate as to what we think the appropriate
15 remedy would be.

16 MR. COHEN: Your Honor, we're not
17 going to stipulate to the remedy. It's not a
18 realistic offer on the other side of the
19 table.

20 There was another problem I did
21 not address not to be repetitive. These were
22 withdrawn complaints. These were dismissed

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1 with prejudice. With respect to terms of
2 carriage of iNHD. The allegation on the other
3 side is that iNHD and Mojo -- we disagree with
4 that, but their allegation is that iNHD and
5 Mojo were fundamentally different services.
6 So what the terms of carriage -- if they
7 succeed in getting to the remedy phase,
8 they're seeking to offer not what Mojo
9 commanded in the marketplace, but what a
10 service which they say is not similarly
11 situated commanded in the marketplace.

12 So now I'm totally confused. I
13 don't think it's appropriate to put it in at
14 this point in time. We can -- if we can get
15 to it -- I understand their argument. They're
16 arguing that the rate that they say is fair
17 and reasonable should be set in part by
18 reference to what iNHD and/or Mojo, they're
19 really saying Mojo, Mojo commanded with
20 respect to these Defendants. Nobody is trying
21 to stop them from making that argument. They
22 can elicit that through testimony.

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1 I don't think there's going to be
2 a tremendous factual dispute about what those
3 terms were. I don't know what that has to do
4 with these complaints and there's prejudicial
5 material in here. There's all sorts of
6 allegations about satellite services, that
7 there was discrimination by IN DEMAND. It
8 doesn't belong in the record in this case.

9 JUDGE SIPPEL: Do you have
10 something to say, Mr. Becker?

11 MR. BECKER: Yes, I just want to
12 add on behalf of Bright House Networks, Bright
13 House Networks has a five percent ownership
14 interest in the IN DEMAND entity. It's not
15 our alter ego. We don't control it. And so
16 the notion that the WealthTV counsel is
17 offering that whatever IN DEMAND does or did
18 should be imputed to Bright House and again,
19 I'm speaking with respect to the client that
20 I represent without implying anything about
21 any other Defendant, is crazy.

22 And not only are they talking

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1 about, as Mr. Cohen said, what they say is a
2 different program service, that is iNHD as a
3 benchmark for what they should be paid, but
4 they're also talking about the actions of
5 parties who are other than the parties who are
6 here before you. And that is the parties I'm
7 referring are Echo Star, DIRECTV AND iN
8 DEMAND. iN DEMAND is not Bright House
9 Networks. And it's not our agent. We don't
10 control it. And so whatever iN DEMAND might
11 have done certainly shouldn't bind Bright
12 House in any way at all.

13 JUDGE SIPPEL: Well, what you were
14 suggesting, you just had like a limited
15 partnership interest in it or something like
16 that?

17 MR. BECKER: I believe that's the
18 structure, yes.

19 JUDGE SIPPEL: I'm bothered by,
20 obviously, getting to the nub of the
21 situation, I'm bothered again by whether we're
22 talking about apples and oranges here. I

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1 think that the thing to do would be to let you
2 put your case on. I assume there's going to
3 be mix throughout the testimony, but let's
4 take the relevance of your proffer at the
5 time.

6 I hope I'm not confusing more than
7 clarifying. My point being that to put in a
8 group of documents that relates to other
9 things, other parties outside the scope of
10 this case and then try and pull that in as
11 relevant to -- really becomes a very narrow
12 issue. If you don't stipulate on remedy, then
13 there's a lot of nitty gritty there, but I
14 don't think you can just rely -- that you can
15 just try and pull it in from some place else.

16 So again, for practicality
17 purposes, for purposes of even efficiencies of
18 handling this case, at this point, I'm
19 inclined not to receive it. Now there may
20 come a way that you can break it down at a
21 later point and show that it is directly
22 relevant. For example, if it shows an

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1 inconsistency on the part of party or parties
2 here who controlled another entity, but I'm
3 hoping we don't have to get to that. I am
- 4 just trying to keep this case on track.

5 Go ahead, Ms. Wallman.

6 MS. WALLMAN: Perhaps I could
7 simplify this in anticipation of your, I
8 think, where your inclination is headed.

9 We had agreed that we would not
10 specify Defendants and Complainant had agreed
11 that we would not specify exhibits that would
12 be used in cross examination. This may be an
13 exhibit that we'd like to use in cross
14 examination and we'll look for an opportunity
15 to do so, just by way of clarification --

16 JUDGE SIPPEL: That's fine.

17 MS. WALLMAN: -- the reason that
18 we're constrained to look at things like this
19 is that we had hoped to point Your Honor to a
20 carriage contract between Mojo and one or more
21 of the Defendants or between iNHD and one or
22 more of the Defendants, but apparently those

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1 don't exist. And so we've looked for other
2 things that we can point to in the event that
3 we do need to prove a remedy.

4 But at this point, I think what
5 we'll do is we'll look for opportunities to
6 use these exhibits in cross examination,
7 perhaps with Mr. Asch and by way of
8 clarification, we certainly understand that
9 Bright House is a small owner of IN DEMAND.
10 The four Defendants together are 100 percent
11 owners. So that connects up with the
12 relevance of why we have been trying to do
13 this and we'll look for an opportunity using
14 the terms of cross examination.

15 JUDGE SIPPEL: That makes great
16 sense. And yes, you don't have to identify at
17 this point now everything you're going to use
18 in cross examination. Cross examination
19 should not be any -- as I said, I don't want
20 an ambush. There should be documents that the
21 other side has seen and you got from them.

22 MS. WALLMAN: I think we've made

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1 sure of that in this case, Your Honor.

2 JUDGE SIPPEL: Thank you. All
3 right, so again, I'm denying the motion as
4 it's a motion to receive that -- and that was
5 the motion to receive what was it?

6 MS. WALLMAN: That was C, D, E, F,
7 we have discussed. The motion did cover G, H,
8 and I.

9 MR. COHEN: I'm prepared to
10 address, Your Honor. G, H, and I are a
11 thousand pages worth of financial information.

12 JUDGE SIPPEL: Let me just rule on
13 the record that C, D, E, and F at this time
14 are -- the motion to receive them into
15 evidence at this point is denied. It would
16 leave for you to attempt to use them in cross
17 examination as you see fit.

18 (Whereupon, the above-referred to
19 documents were marked as Exhibits
20 C, D, E, and F for
21 identification.)

22 MS. WALLMAN: Thank you, Your

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1 Honor.

2 JUDGE SIPPEL: And now we're on --

3 MR. COHEN: G, H, and I are
4 various financial documents for Time Warner
5 and Comcast. There are about a thousand pages
6 in the aggregate.

7 JUDGE SIPPEL: I don't mean to cut
8 you off, but those are the FCC filings?

9 MR. COHEN: No, Your Honor.

10 JUDGE SIPPEL: I mean the SEC
11 filings.

12 MR. COHEN: SEC filings.

13 JUDGE SIPPEL: Securities and
14 Exchange Commission.

15 MR. COHEN: My only objection
16 here, Your Honor, is we don't see any reason
17 to burden the record with a thousand pages.
18 If there's a relevant page or two from those
19 filings, I'm sure they constitute admissions
20 of Time Warner and Comcast. We have no
21 objection to receiving them. We don't see any
22 reason to dump in a thousand pages of -- I

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1 don't want to say worth the poor tree side of
2 the -- we've killed a lot of trees in this
3 case, but we don't see putting in a thousand
4 pages. We think that's just going to confuse
5 the record.

6 So if there are specific pages in
7 these financials that they think are relevant
8 and constitute admissions, we would not object
9 to that, but we don't see the reason to dump
10 in a thousand pages.

11 MR. FELD: Your Honor, if I may be
12 perhaps overcautious in wanting to be sure
13 that all of the information that we might want
14 to use would be available, that there would be
15 no surprises. We're certainly happy to
16 proceed with these exhibits, G, H, and I, that
17 as they arise we will introduce or seek to
18 introduce relevant portions that would be
19 admissions and to move forward in that
20 fashion.

21 JUDGE SIPPEL: Yes, if some
22 executive got a new pair of shoes as a bonus

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1 or something, I don't really care about that.
2 But yes, the financials are good information.
3 Certified financials, the kind that Mr. Madoff
4 filed.

5 (Laughter.)

6 The real deal. I'm not making
7 light of 10Ks and 10Qs and publicly-traded
8 companies. So we're in a whole different
9 ballpark. I'm just trying to inject a little
10 humor into this.

11 (Laughter.)

12 It's important stuff. It's
13 important stuff. All right, then we'll take
14 it as it comes. Fair enough?

15 MR. COHEN: Thank you, Your Honor.

16 JUDGE SIPPEL: So again, I'm not
17 denying the motion, I'm just reserving on it
18 until you have further specification of the
19 parts of the Securities and Exchange
20 Commission filings.

21 Thank you very much.

22 (Whereupon, the above-referred to

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1 documents was marked as WealthTV
2 Exhibits G, H, and I for
3 identification.)

4 Now that -leaves us what with --

5 MR. FELD: Now we're on one.

6 (Laughter.)

7 JUDGE SIPPEL: All right.

8 MR. ROSE: If there's no objection
9 to 1, you'll be happy to know that objections
10 to 1 through 5 were withdrawn last night.
11 There are actually five things we have agreed
12 on.

13 JUDGE SIPPEL: Let's find out the
14 exhibits -- let's see what we're dealing with.
15 We're dealing with Volume 1 of WealthTV's
16 hearing exhibits, one of three volumes. And
17 we're talking about exhibits tabbed 1 through
18 33. Are we all on the same page with that?

19 MR. COHEN: Yes, Your Honor.

20 JUDGE SIPPEL: And you know what
21 I've done. Again, I have tripped over another
22 log here.

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1 Mr. Schonman, I haven't asked you
2 whether you have any position on these
3 rulings. Are you satisfied? Do you take a
4 position?

5 MR. SCHONMAN: I had a position.
6 I'm satisfied with your rulings thus far.

7 (Laughter.)

8 JUDGE SIPPEL: All right, I'll
9 take that as a vote of confidence. That's at
10 my own risk.

11 All right, and also before we
12 start, what the heck is Mojo? I think I know
13 what it is, but is it in your glossary? Is it
14 identified in your glossary, described in your
15 glossary?

16 MR. ROSE: If I may, Your Honor.

17 JUDGE SIPPEL: Yes, sir.

18 MR. ROSE: Mojo is simply the
19 programming channel that was developed by
20 iNHD, the joint venture among these Defendants
21 that our client contends is essentially the
22 channel they carry on more favorable terms.

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1 They favored them in discriminating against
2 WealthTV, that's the basis of the complaint.

3 MR. FELD: And we really -- there
4 are some factual issues that will be
5 determined here at trial as to whether Mojo
6 constituted a different channel from iNHD.
7 Defendants say that it was the same channel
8 and iNHD, but was retooled and rebranded. We
9 understand that is to be a factual issue at
10 trial, but Mojo refers to the programming
11 which we have said is substantially similar to
12 that of our client, WealthTV, and which we
13 allege was given preferable treatment to the
14 detriment of WealthTV.

15 JUDGE SIPPEL: All right, now I
16 can understand that. So Mojo is not a -- it's
17 not a distributor, it's a producer.

18 MR. ROSE: Mojo is a channel
19 that's produced by iNHD, I'm sorry iN DEMAND.

20 MR. FELD: Your Honor, IF i MIGHT.

21 JUDGE SIPPEL: Let him finish.

22 MR. HARDING: iN DEMAND, LLC is a

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1 joint venture owned by the four Defendants in
2 this case. IN DEMAND's principal business is
3 offering pay-for-view movies on a
4 transactional basis to various cable and
5 satellite distributors, offering prize fights,
6 that sort of thing; transactional, in other
7 words, you pay per program. That's their
8 principal business. And they've been doing
9 that for some amount of years.

10 JUDGE SIPPEL: Is that kind of a
11 la carte concept?

12 MR. HARDING: It's like pay-per-
13 view or video-on-demand, as it's known in the
14 industry now. So you pay for each movie that
15 you order on a transactional basis. That's
16 their principal business.

17 JUDGE SIPPEL: I hear it.

18 MR. HARDING: They then developed
19 two channels of linear programming called INHD
20 and INHD2 which ultimately were INHD
21 transformed into Mojo and INHD2 went off the
22 air. So they're programming networks, Mojo.

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1 JUDGE SIPPEL: So the linear
2 programming of iNHD and iNHD2 was in effect
3 either taken over by or transferred to Mojo.

4 MR. HARDING: And became Mojo,
5 correct.

6 JUDGE SIPPEL: And Mojo consists
7 of the same four parties?

8 MR. HARDING: Mojo is owned and
9 was created by iN DEMAND, LLC which is
10 ultimately owned by the four Defendants.

11 MR. SOLOMON: Your Honor, Mojo is
12 just the name of the channel. It's owned by
13 iN DEMAND.

14 JUDGE SIPPEL: It's the name of
15 the channel.

16 MR. COHEN: In the same way that
17 WealthTV is the name of the Complainant's
18 network. That's really the best way to think
19 about it.

20 MR. HARDING: Or HBO or ESPN or
21 any other channel that you might be familiar
22 with.

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1 MS. WALLMAN: In this context,
2 Your Honor, the term network is sometimes used
3 interchangeably with channel.

4 JUDGE SIPPEL: Correctly or
5 incorrectly?

6 MS. WALLMAN: Commonly.

7 JUDGE SIPPEL: Commonly. That
8 doesn't answer the question.

9 MS. WALLMAN: Correctly, I
10 believe.

11 JUDGE SIPPEL: Correctly. So
12 network and channel are interchangeable in a
13 generic sense.

14 MR. ROSE: But we mean the
15 difference between a channel is content that
16 they carry and the cable companies operate
17 systems to carry the content which could also
18 be referred to as networking sometimes.

19 JUDGE SIPPEL: Well, I understand
20 the difference. You mean the vertical -- I
21 mean all of this comes down to the vertical
22 control by well, the four Defendants through

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1 in DEMAND of Mojo. Is that -- am I walking
2 down the path right?

3 MR. FELD: Yes, that's correct.
4 That is the affiliation to which the parties
5 have stipulated that through their joint
6 partnership of in DEMAND they are owners as
7 the FCC has defined that term, having
8 attributable interest in the network Mojo.

9 JUDGE SIPPEL: And WealthTV, I
10 take it, is simply a program producer. You're
11 not a -- what is it, an MOS or MSO.

12 MR. FELD: MSO. Right. That is
13 correct, Your Honor. WealthTV is a program
14 producer. It does not own transmission
15 facilities. It produces programming and
16 contracts with other entities to distribute
17 the programming.

18 It is a video vendor, as defined
19 in Section -- I believe it's Section 616 which
20 is the relevant statute here.

21 JUDGE SIPPEL: Okay, all right.
22 Is it just -- so that I'm starting off from

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1 the right starting block, is it -- what kind
2 of -- generally, what kind of programming is
3 it? We know like last week, we had the NFL
4 and sports. That's easy. What is the type of
5 programming that we're talking about for
6 WealthTV?

7 MR. FELD: As Your Honor will
8 discover that will be one of the issues that
9 will be litigated in the case. Certainly we
10 maintain and continue to maintain that
11 WealthTV produces high definition programming
12 for the -- primarily for males ages 25 through
13 49 earning \$100,000 a year or more in income.

14 Now we also understand that and
15 certainly expect that other people will find
16 that programming interesting and there will be
17 considerable testimony about that and what it
18 means, but the type of programming that is
19 produced are generally shows about adventure
20 travel, cars, tech gadgets, high-end living,
21 things that would be of interest to those who
22 either are earning that kind of money,

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1 particularly men who are earning that kind of
2 money and have that disposable income, or
3 those who wish they had that kind of money.

4 JUDGE SIPPEL: Thank you.

5 MR. COHEN: Your Honor, there's
6 going to be a considerable disagreement. I
7 don't want to burden the Court with arguments,
8 but the network, you will hear during the
9 examination has described itself in lots of
10 different ways. We think of it as mostly
11 being programming about wealth.

12 JUDGE SIPPEL: That's WealthTV.

13 MR. COHEN: It's not a men's
14 network in our judgment. We don't think we
15 should be having the argument now. There's
16 going to be lots of testimony and lots of
17 argument about that during the course of the
18 trial, but it is the Defendants' position that
19 this is not a network that is designed
20 primarily for men. You will hear a lot of
21 testimony about the programming on the
22 network. So I don't think this is an

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1 appropriate time to have an extended argument
2 about it.

3 JUDGE SIPPEL: I'm not looking for
4 an argument.

5 MR. COHEN: We just don't agree
6 about what the network it.

7 JUDGE SIPPEL: Where are we going
8 with this -- is the 25 to 49, is that -- does
9 anybody have any problem with that?

10 MR. COHEN: I don't think there's
11 adequate proof of that, Your Honor.
12 Ultimately, the 25 to 49 argument, their
13 principal argument turns on the combination of
14 25 to 49 and it being programming targeted
15 towards men, because Mojo is a network
16 targeted towards men. It is the Complainant's
17 position that WealthTV was always targeted
18 towards men and we think we will demonstrate
19 convincingly in the course of this proceeding
20 that it was not and we'll prove it out of
21 their own documents.

22 JUDGE SIPPEL: I was curious about

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1 that because in the other NFL case, I didn't
2 meet the cut either. Nobody cared about me
3 from the -- and I don't think anybody is going
4 to care about me from --

5 MR. COHEN: We're going to find
6 some programming for over 49 which I'm in as
7 well. I'm in your category here. We're going
8 to find some over 49 programming here.

9 MS. WALLMAN: Your Honor, the
10 reason that this matters at all is that the
11 competition for the target demographic which
12 we contend exists between WealthTV and Mojo is
13 central to our case and central to our proof.

14 I referred earlier to some
15 conflict in testimony about Mojo's
16 demographic, whether it's 18 to 49 or 25 to
17 49, so this is a key issue in the case.

18 JUDGE SIPPEL: Okay, well, that's
19 good to know up front too. But -- all right,
20 okay, you've told me. There was no
21 disagreement in the NFL case about the male
22 audience being the primary thing, but I take

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